No. 10-836

Supreme Court, U.S.
FILED
APR 8 - 2011
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In The

# Supreme Court of the United States

PAUL TIEN,

*Petitioner,*

v.

MING TIEN, *et al.*

*Respondents.*

**On Petition For A Writ Of Certiorari To The Third District Court Of Appeal State Of Florida**

## PETITIONER'S REPLY BRIEF

DIRK LORENZEN
LORENZEN LAW P.A.
150 Alhambra Cir., Ste. 1220
Coral Gables, FL 33134
(305) 447-1203

ROBERT P. CHARROW
*Counsel of Record*
MARK E. SOLOMONS
LAURA METCOFF KLAUS
GREENBERG TRAURIG LLP
2101 L Street, N.W.,
Ste. 1000
Washington, D.C. 20037
(202) 533-2396
charrowr@gtlaw.com

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OR CALL COLLECT (402) 342-2831

## INTRODUCTION

This petition for certiorari seeks review of a Florida court judgment affirming the denial of a motion to quash substitute service of process in Taiwan and a decision that requires a litigant to seek and obtain review by this Court in order to seek collateral relief in other courts. Respondent, Ming Tien, argues that this Court lacks jurisdiction to entertain this Petition despite the plain language of 28 U.S.C. § 1257(a).[1] She also argues that the circuits are not split on whether Taiwan's sovereignty is justiciable, pointing to a group of cases holding that Taiwan is a sovereign for treaty purposes, but ignoring that by resolving the issue on the merits, those courts treated the issue as if it were justiciable. Her argument thus only highlights the judicial uncertainty that invites review by this Court. Finally, Ming Tien argues that Dr. Tien somehow waived the jurisdictional issues presented in this petition even though a party cannot waive justiciability especially when it converges, as it does here, with subject matter jurisdiction. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)) (subject matter jurisdiction "can never be forfeited or waived.").[2]

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[1] The original petition erroneously noted that jurisdiction was based on § 1254(1), rather than § 1257(a).

[2] Dr. Tien disagrees with many of the fact statements made by Ming Tien, but none is relevant to this petition.

## ARGUMENT IN REPLY

1. This Court has jurisdiction to entertain this petition. Contrary to Ming Tien's response, the Constitution authorizes this Court to exercise appellate jurisdiction over any case, state or federal, where there is a federal issue or diversity exists (*see* U.S. CONST., art. III, § 2), and which has been implemented by Congress to authorize review by certiorari of

> [f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States. . . .

28 U.S.C. § 1257(a).

Ming Tien argues that state law, namely, "section 48.194 of the Florida Statutes . . . governs this dispute." Response at 9. Section 48.194, however, expressly incorporates the Hague Convention and requires the State courts to decide whether that treaty applies to Taiwan. That action is not justiciable: it is beyond the constitutional reach of a State tribunal to interfere with United States foreign policy. Further, this Court regularly entertains certiorari petitions from state intermediate appeals courts where the highest court of that state has declined

review, as is the case here.[3] *See e.g., Tory v. Cochran*, 544 U.S. 734 (2005) (certiorari to the Court of Appeal of California). Finally, Ming Tien suggests that Rule 10 somehow precludes this petition even though the factors identified in the Rule are "neither controlling nor [a] full[] measur[e] [of] the Court's discretion. . . ."

2. Ming Tien argues that there is no circuit split among the federal courts as to whether Taiwanese sovereignty is justiciable because the courts have uniformly held that the Hague Convention and other multilateral treaties do not apply to Taiwan. *See* Response at 15-16. The very act of deciding the issue of whether the Convention or treaties apply to Taiwan places the Ninth Circuit at odds with the Second and D.C. Circuits. *Compare Mingtai Fire & Marine Ins. Co., Ltd. v. United Parcel Serv.*, 177 F.3d 1142 (9th Cir. 1999) (suggesting that the question of Taiwan's sovereignty is justiciable) *with Lin v. United States*, 561 F.3d 502 (D.C. Cir. 2009) and *767 Third Ave. Assoc. v. Consulate Gen. of the Socialist Fed. Rep. of Yugoslavia*, 218 F.3d 152 (2d Cir. 2000) (both holding that the issue raises a political question involving foreign policy and is therefore not justiciable). To hold that the Convention does not apply to Taiwan requires a Court to treat Taiwan as if it were a sovereign state, distinct from the People's Republic

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[3] Fla. Stat. § 48.194(1) provides in pertinent part that "[s]ervice of process of persons outside the United States may be required to conform to the provisions of the Hague Convention. . . ." Petition at App.18.

of China. That issue, though, requires a court to make foreign policy determinations of the type that have been "committed by the Constitution to the Executive and Legislative – 'the political' – Departments." *Medellin v. Texas*, 552 U.S. 491, 511 (2008) (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918)). In keeping with this admonition, courts have consistently avoided interfering with United States foreign policy especially where that policy is intentionally ambiguous, as is the so-called "one China policy."

Ming Tien does not dispute that if the applicability of the Hague Convention is not justiciable, she can never establish *in personam* jurisdiction under the state long-arm statute in the Florida State Court over Dr. Tien, a foreigner domiciled in Taiwan. Thus, the lack of justiciability would be dispositive of the litigation in Florida.

3. Finally, Ming Tien argues that justiciability has somehow been waived. That is not the case. Where an issue is not justiciable because it falls outside the judicial sphere, as in a case where a court is being asked to make foreign policy, justiciability and subject matter jurisdiction merge and neither can be waived. *See Arbaugh v. Y & H Corp.*, 546 U.S. at 514; *Oryszak v. Sullivan*, 576 F.3d 522, 527 (D.C. Cir. 2009) ("nonjusticiability of a claim may not be waived"); *Alvarez-Machain v. United States*, 331 F.3d 604, 664 n.8 (9th Cir. 2003) (en banc) (Gould, J., dissenting), *rev'd sub nom., Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) ("However, because the political question doctrine affects our jurisdiction, and because

the political implications of this case for executive branch actions on foreign soil affecting relations with foreign nations are grave and apparent, I believe the issue must be considered *sua sponte* and fronted. Of course, it is not too late for the government, in seeking corrective review by petition for writ of certiorari, to advance the position that the political question doctrine precludes jurisdiction"); *Jefferson v. Cingular Wireless*, 531 F.3d 595, 602 n.9 (8th Cir. 2008) ("justiciability requirements cannot be waived by the parties"); *Buono v. Kempthorne*, 527 F.3d 758, 778 n.11 (9th Cir. 2008) ("Because this issue is not one of justiciability or jurisdiction, the government waived the argument by failing to challenge the scope of the district court's action before that court."). Here, the issue of justiciability implicates not only a court's subject matter jurisdiction but also its jurisdiction over the person. Indeed, courts not infrequently dismiss these types of cases *sua sponte*. *See Luftig v. McNamara*, 373 F.2d 664, 665 (D.C. Cir. 1967) (affirming district court's *sua sponte* dismissal of complaint "on the ground that the relief sought represented a claim for judicial review of political questions"); *Mahorner v. Bush*, 224 F.Supp.2d 48, 53 (D.D.C. 2002) (dismissing *sua sponte* claims that "present political questions not subject to judicial review").

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT P. CHARROW
*Counsel of Record*
MARK E. SOLOMONS
LAURA METCOFF KLAUS
GREENBERG TRAURIG LLP
2101 L Street, N.W., Ste. 1000
Washington, D.C. 20037
(202) 533-2396

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